Supreme Court, U.S.
FILED
JAN 10 1996
OFFICE OF THE CLERK

No. 95-893

In The

Supreme Court of the United States

October Term, 1995

CHARLES SCHNABOLK, KALON SYSTEMS, INC. and ANDRA SYSTEMS, INC.,

Petitioners,

vs.

SECURITRON MAGNALOCK CORP.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN C. SABETTA
Counsel of Record
NATHANIEL H. AKERMAN
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Attorneys for Respondent
900 Third Avenue
New York, New York 10022-4728
(212) 715-9000

8061
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Do two separate corporations and one individual constitute a proper association in fact enterprise under the RICO statute?

2. Is an injunction prohibiting false and deceptive conduct in the marketplace valid under the New York State Constitution ?

STATEMENT PURSUANT TO RULE 29.6

Securitron Magnalock Corp. has no parent companies or non wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below, Jurisdiction, Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
A. The Racketeering Enterprise	2
B. The Deceptive Acts Proven Under the New York General Business Law	3
Reasons for Denying the Writ	4
I. The Second Circuit Properly Applied Settled Law in Ruling that the Racketeering Enterprise Was Proper.	4
II. The Second Circuit Properly Followed Well-Established New York Law in Affirming the Injunction Issued Pursuant to the New York General Business Law.	5
Conclusion	7

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) .. 7

Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989) ... 5

Frisby v. Schultz, 487 U.S. 474 (1988) 7

Huddleston v. Dwyer, 322 U.S. 232 (1949) 7

Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995) 5

Marcus v. Jewish Nat'l Fund, Inc., 557 N.Y.S. 2d 886 (1st Dep't 1990) 5

McDonald v. North Shore Yacht Sales, Inc., 513 N.Y.S. 2d 590 (Sup. Ct., Nassau Co. 1987) 5, 6

National Organization for Women, Inc. v. Scheidler, __ U.S. __, 114 S. Ct. 798, 62 USLW 4073 (1994) 5

People v. British & Amer. Casualty Co., 505 N.Y.S. 2d 759 (Sup. Ct. N.Y. Co. 1986) 6

People v. Record Club of America, Inc., 380 N.Y.S. 2d 26 (1st Dep't 1976) 5

Contents

	Page
Reves v. Ernst & Young, 507 U.S. 170, 113 S. Ct. 1163 (1993)	5
Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339 (2d Cir. 1994)	5
Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2d Cir. 1995)	1, 2, 3, 4
State v. Terry Buick, Inc., 520 N.Y.S. 2d 497 (Sup. Ct. Dutchess Co. 1987)	5
Towers Financial Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820 (S.D. N.Y. 1992)	6
Quinn v. Aetna Life and Casualty Co., 409 N.Y.S. 2d 473 (Sup. Ct., Queens Co. 1978)	6
Statutes Cited:	
18 U.S.C. § 1961(4)	4
New York General Business Law § 349	6
New York General Business Law § 349(a)	4, 6
New York General Business Law § 349(h)	1, 4, 6

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

On October 20, 1994 an Order and Judgment was filed against Charles Schnabolk, Kalon Systems, Inc. ("Kalon") and Andra Systems, Inc. ("Andra") after a jury verdict in the United States District Court for the Southern District of New York awarding Securitron Magnalock Corporation ("Securitron") (1) $1,050,000 on the RICO count after trebling the total damages, (2) $284,134 as reasonable attorneys' fees on the RICO count and the New York General Business Law count and (3) $58,847 as the costs of the suit on the RICO count. Pursuant to New York General Business Law § 349(h), the Order and Judgment also permanently enjoined Schnabolk, Kalon and Andra from engaging in materially deceptive acts and practices against Securitron within the State of New York.

On September 7, 1995, the United States Court of Appeals for the Second Circuit in a published opinion affirmed the judgment of the district court in all respects. *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2d Cir. 1995).

The petition for a writ of certiorari should be denied because the question presented by the petitioner on the RICO enterprise does not concern conflicting decisions of courts of appeals and was decided by the Second Circuit Court of Appeals based on settled law. As to the question presented on the injunction issued pursuant to the New York General Business Law, the Second Circuit Court of Appeals based its decision on settled New York State law permitting a court to enjoin deceptive speech in the business marketplace.

STATEMENT OF THE CASE

The facts are fully set forth in the Second Circuit's opinion affirming the district court's judgment. *Securitron Magnalock v. Schnabolk*, 65 F.3d at 258-62. Set forth below is a summary of the

facts which relate to the two issues raised in defendants' petition for certiorari.

A. The Racketeering Enterprise

The proof at trial showed that the racketeering enterprise was an association-in-fact consisting of the defendants Schnabolk, Andra Systems, Inc. ("Andra") and Kalon Systems, Inc. ("Kalon"). Kalon is a corporation in the business of installing security equipment. In 1988 and 1989 Schnabolk was the owner of Kalon and had been its President for the previous nineteen years. In 1988 Osborne Frazier was Vice President in charge of marketing for Kalon. In the late 1980's Kalon had at least fifteen employees. In 1988 and 1989 Kalon sold security systems to schools, museums, hospitals, public institutions, art exhibits and commercial accounts mostly in New York City. In 1990 Kalon was the biggest lock installer of electromagnetic locks on fire doors in New York City.

Andra is a corporation in the business of manufacturing alarm systems, electromagnetic locks and related systems. Andra's electromagnetic lock is known as the Andralock. Prior to May, 1989 the President of Andra was Louie Delisio, and Schnabolk was the majority shareholder with some shares owned by Delisio. On May 1, 1989, Schnabolk's controlling block of Andra stock was sold to undisclosed individuals.

The Second Circuit specifically held that "[t]he jury had adequate evidence to support their finding identifying Schnabolk, Kalon and Andra as an association-in-fact and as the persons who conducted the enterprise as well." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d at 264. Recognizing that "a corporation cannot be both the enterprise and person" [citation omitted], the Court specifically held that "the situation is different here" because "Kalon and Andra were two separate and distinct corporations" and that "Kalon is an entity distinct from Andra, and both corporations are distinct from Schnabolk." *Id.* at 263. The Court also found that

both "corporations were active, operating businesses rather than two stacks of stationery" and that "even if Schnabolk owned 100% of the shares of each corporation, the corporations would be separately existing legal entities capable of constituting an association-in-fact enterprise" [citation omitted]. *Id.* at 263. Finally, the Court found that "[b]oth corporations benefited from the illicit activities of their agents, Schnabolk and Osborne" and because each corporation had "an actual ongoing business with a presence in the marketplace", there was sufficient evidence from which "the jury could conclude that there was a deliberate effort to sue both independent entities to give a spurious validity" to the falsehoods defendants disseminated about the Securitron product. *Id.* at 263-64.

B. The Deceptive Acts Proven Under the New York General Business Law

Securitron, a manufacturer of electromagnetic locks and related locking system equipment, proved at trial that beginning in approximately September 1987 and continuing up until August 1989 defendants Schnabolk, Kalon and Andra intentionally engaged in deceptive acts and practices directed against Securitron through eight separate schemes to defraud. The defendants' goal, as explained by Schnabolk in his own words in a tape recorded conversation, was: "[T]his Securitron thing, I'm trying to put them out of business." The eight separate schemes to defraud were directed at (1) eliminating Securitron's approvals from public and private regulatory agencies, (2) stealing potential business from Securitron and (3) stealing customers from Securitron. These eight schemes to defraud were predicated on the following falsehoods, all of which were designed to destroy Securitron's reputation for making a safe and reliable product:

(1) Locks manufactured by Securitron short circuit in a locked position,

(2) Locks manufactured by Securitron are banned in New York City,

(3) The Newark Board of Education regularly issues contracts to have locks manufactured by Securitron removed from Newark Schools, and

(4) Locks manufactured by Securitron failed in a test administered by Underwriter's Laboratories.

Pursuant to New York General Business Law, § 349(a), (h), the district court enjoined the defendants "from engaging in materially deceptive acts and practices." The Second Circuit summarily "reject[ed] appellants' contention that the injunctive relief granted by the district court on the General Business Law claim is unwarranted and contrary to the free speech provisions of the New York State Constitution." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d at 265.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT PROPERLY APPLIED SETTLED LAW IN RULING THAT THE RACKETEERING ENTERPRISE WAS PROPER.

Petitioner's claim that the Second Circuit's affirmance of the RICO enterprise consisting of two independent corporations and an individual "expanded civil RICO beyond all recognition" is absurd. Br. 9.[1] The RICO statute defines an "enterprise" as including "any union or group of" separate corporations or individuals "*associated in fact although not a legal entity.*" 18 U. S. C. § 1961(4) (emphasis

1. "Br." refers to pages in the defendants' Petition for a Writ of Certiorari.

added). *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) and other cases cited by Petitioner do not apply to the present case since the enterprise proved in this case is an association-in-fact comprised not solely of a single corporation and its employees, but of two distinct corporations which were separate ongoing businesses. Indeed, the only other Circuit which has considered this issue is totally consistent with the Second Circuit's ruling in this case. *Fleischhauer v. Feltner*, 879 F. 2d 1290, 1296-97 (6th Cir. 1989).[2]

II.

THE SECOND CIRCUIT PROPERLY FOLLOWED WELL-ESTABLISHED NEW YORK LAW IN AFFIRMING THE INJUNCTION ISSUED PURSUANT TO THE NEW YORK GENERAL BUSINESS LAW.

Petitioner's assertion that the injunction granted by the district court and affirmed by the Second Circuit "is totally contrary to the protections of free speech imposed by the New York Constitution" is not supported by ironclad principles of New York law. Br. 16. The Second Circuit's affirmance of the district court is consistent with the abundant case law in which the New York state courts have issued injunctions against deceptive or misleading speech in a business context. *See, e.g., Marcus v. Jewish Nat'l Fund, Inc.*, 557 N.Y.S. 2d 886 (1st Dep't 1990); *People v. Record Club of America, Inc.*, 380 N.Y.S. 2d 26 (1st Dep't 1976); *State v. Terry Buick, Inc.*, 520 N.Y.S. 2d 497 (Sup. Ct. Dutchess Co. 1987); *McDonald v.*

---

2. Also, under this Court's recent holdings in *Reves v. Ernst & Young*, 507 U. S. 170, 113 S. Ct. 1163, 1173 (1993) and *National Organization for Women, Inc. v. Scheidler*, __ U. S. __, 114 S. Ct. 798, 804, 62 USLW 4073 (1994), it is clear that an individual like Schnabolk can be a RICO defendant and a part of an association-in-fact enterprise consisting of corporate defendants of which he is an officer. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 268-69 (3d Cir. 1995).

North Shore Yacht Sales, Inc., 513 N.Y.S. 2d 590 (Sup. Ct., Nassau Co. 1987); *People v. British & Amer. Casualty Co.*, 505 N.Y.S. 2d 759 (Sup. Ct. N.Y. Co. 1986); *Quinn v. Aetna Life and Casualty Co.*, 409 N.Y.S.2d 473 (Sup. Ct., Queens Co. 1978).

In *Quinn*, for example, the court held that the under the United States and New York Constitutions, "when commercial expression is false or misleading it is afforded no protection whatsoever." *Id.* at 478. Thus, the court found that "an injunction will constitutionally lie against [one of the] defendant['s] . . . continued publication of misleading advertising . . . ." *Id.* at 478-79. This same principle underlies New York's public policy against defendants' deceptive conduct, as exemplified by G.B.L. § 349, which forbids "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . ." and *specifically a*uthorizes the remedy that "any person who has been injured by reason of any violation of this section . . . may bring an action in his own name to enjoin such unlawful act or practice." G.B.L. § 349(a),(h). *See also, Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F. Supp. 820 (S.D.N.Y. 1992) (TRO granted under G.B.L. § 349 prohibiting competitor from publishing report that allegedly contained false and misleading information about plaintiff's history and financial condition).

The injunction issued in this case only prohibits the defendants from engaging in "materially deceptive acts and practices" which fall within § 349's scope. Thus, the injunction is narrowly tailored to enjoin "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . ." and as such restrains conduct and speech that fall entirely outside the scope of the United States and New York Constitutions' protections of speech.

Finally, the United States Supreme Court does not ordinarily review determinations, such as this one, which involve

interpretations of state law. In *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1949), the United States Supreme Court stated that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." The United States Supreme Court traditionally views the courts of appeals as experts regarding the laws of the states within their circuits because they "are better schooled in and more able to interpret the laws of their respective states." *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), *quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). Petitioners have provided no sound reason whatsoever for the Court to deviate from this rule in this case.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

JOHN C. SABETTA
Counsel of Record
NATHANIEL H. AKERMAN
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Attorneys for Respondent
900 Third Avenue
New York, New York 10022-4728
(212) 715-9000